No. 449

In the Supreme Court of the United States

OCTOBER TERM, 1942

MARICOPA COUNTY, ARIZONA; W. H. LINVILLE, as County Treasurer, and Ex-Officio Tax Collector of Maricopa County, Arizona; J. D. BRUSH as County Assessor of Maricopa County, Arizona; CHARLES H. FIELDS, JOHN A. FOOTE and GEORGE FRYE, as members of and constituting the Board of Supervisors and County Board of Equalization of Maricopa County, Arizona; PIMA COUNTY, ARIZONA; WALLACE S. BRANSFORD, as County Treasurer and Ex-Officio Tax Collector of Pima County, Arizona; THOMAS COLLINS, R. H. MARTIN, and J. B. MEAD, as members of and constituting the Board of Supervisors and County Board of Equalization of Pima County, Arizona,

Petitioners,

vs.

THE VALLEY NATIONAL BANK OF PHOENIX, a national banking association,

Respondent.

SUPPLEMENTAL BRIEF ON BEHALF OF PETITIONERS

On Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit

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SUPPLEMENTAL BRIEF ON BEHALF OF PETITIONERS

We are directed to discuss "whether petitioners, who are counties, are within the constitutional protection which they assert", being the Fifth and Tenth Amendments.

I.

COUNTY TREASURERS, WHO ARE INCLUDED AS PETITIONERS, ARE STATE OFFICERS

The petitioners are the counties of Maricopa and Pima, Arizona, and their officials, all having been joined as defendants in plaintiff's suit for an in-

junction. The tax collectors are the county treasurers of the counties in Arizona and none others than they were necessary parties defendant to an effective injunction. The country treasurers collect both state and county taxes, as well as those for cities and towns (with the single exception of Phoenix, as to Maricopa County) school districts, and other political subdivisions, and the judgments enjoin them alone. (R. 202, 267).

These petitioners originally believed that this suit fell within the terms of the Three Judge Act, Section 266 of the Judicial Code, Title 28, U.S.C. 380, and the county treasurer of Pima County alone, as a state officer within the meaning of that statute, petitioned this Court for a writ of mandamus to require the District Judge to convene a Three Judge Court. It was held that he was a proper and sufficient party petitioner, i.e. an officer of the State of Arizona, although the petition was denied upon other grounds.

Ex Parte Bransford, 310 U.S. 354,
84 L. Ed. 1249, 60 Sup. Ct. Rep. 947.

The constitutional protection which is asserted in this case is on behalf of the state. Similarly, it is asserted on behalf of counties, municipalities, school districts, irrigation districts, and other legal subdivisions for whom the county treasurer collects taxes. The State of Arizona by its lawful agents is as much a party as though it were represented by the Governor and the Attorney General. These suits are necessarily against state officers, as formal parties defendant, rather than the states themselves. It may be that the Court did not have in mind any distinction between the state and a county thereof, and we will at first,

therefore, consider the question as though the word "state" was included in the question. Later we will undertake to discuss the question specifically as put under Subdivisions II and III, pages 13 and 22, infra.

We take the position that by the Fifth and Tenth Amendments, as well as the other eight of the first ten, protection was intended to be granted to states and their counties and legal subdivisions and all persons, natural and artificial, who are judicially cognizable and to whom the language of the amendments is appropriate.

Twelve amendments were submitted by the First Congress as a group and most likely so considered by the states. No one was better qualified to state the purpose behind these amendments than Chief Justice Marshall, who had taken an active part in the Virginia Constitutional Convention.

In

Barron vs. Baltimore, 7 Peters 243, 8 L. Ed. 672,

the question was whether the Fifth Amendment was a limitation upon the power of the states. The court, speaking through the Chief Justice, held that it was not and, in language often quoted since, proceeded to state the purpose of the first ten amendments in these words:

> "But it is universally understood, it is a part of the history of the day, that the great revolution which established the Constitution of the United States was not effected without immense opposition. Serious fears were extensively entertained that those powers which the patriot statesmen who then watched over the interests of our country, deemed essential to union, and to the attain-

> ment of those invaluable objects for which union was sought, might be exercised in a manner dangerous to liberty. In almost every convention by which the Constitution was adopted, amendments to guard against the abuse of power were recommended. These amendments demanded security against the apprehended encroachments of the general government—not against those of the local governments."

We think we are justified in interpreting this statement to mean that the amendments were designed to prevent the new government from destroying liberty in its broadest sense, that is to say, whether it be the liberty of persons, states, or local governmental institutions.

Indeed, that very idea was expressed by the Supreme Court a few years later in

> *Withers vs. Buckley*, 20 Howard 84,
> 15 L. Ed. 816.

The holding was that the Fifth Amendment was not available to one who complained of action by the State of Mississippi. The Court adopted the language it had used in the Barron case and considerably enlarged thereon. The sentence we have in mind reads:

> "In all such cases this court has ruled, that the clause in question" (taking property without compensation) "was applicable to the federal government alone, and not to the states except as it was designed for their security against federal power."

Both expressly and by implication, we think, it is clear that it was intended that the states would be beneficiaries of the guarantees of these amendments. Thus, the Second Amendment prohibits the infringe-

ment of the right of the people to keep and bear arms so that a well regulated militia may be maintained. The militia intended was that which a "free" state might maintain. The Tenth Amendment specifically reserves to the states powers not surrendered to the United States or prohibited to them.

The emphasis of the Constitution makers at the time was on the creation of restraints against the exercise of the federal power. They may not have clearly foreseen the possibility of arbitrary action by the Federal Government which would affect the property interests of states,—ex. g., depriving without due process, taking without compensation, etc.—, but it seems clear that had it been brought specifically to mind and any question as to the sufficiency of the language to include states been raised, the amendments would have included states by name.

Nor was there opportunity for critical examination of words or alteration of the language submitted by Congress. It was a case of adopting the amendments as written or seriously delaying action. The Tenth Amendment was obviously designed to take care of situations unmentioned elsewhere in the proposals and purposely phrased to include the states and their people.

In short, these amendments were drawn for the protection of the liberty of all those who might need it in the protection of their lives, liberty or property and who were capable of appealing to the courts for such protection. We see no justification in reading an exception in these guarantees. They have been applied to every kind of person, natural and artificial, even to alien enemies and German spies, and there should certainly be some overpowering reason why a state

and political subdivisions thereof, seeking to protect their property rights, are to be regarded as the only entities not entitled to invoke these constitutional safeguards. We know of no such reason.*

A discussion of the meaning of particular words and phrases employed in these amendments is not, we think, particularly helpful. Volumes have been written on "due process" and "liberty" and their outlines are still only rather vaguely discerned. Nevertheless, if we consider the meaning of the word "person" as used in the Fifth Amendment, we think the result is the same. That word was, we submit, intended to have its broadest signification. Artificial persons at that time were not unknown and were included, as this Court had no difficulty in deciding. Such a creature of the state is not unlike the state itself, particularly in these days when we find states engaging in industrial enterprises.

In

Ohio vs. Helvering, 292 U.S. 360, 78 L. Ed. 1307, 54 Sup. Ct. Rep. 725,

the State of Ohio in its operation and control of the liquor business was held to be a "person" and thus required to comply with the United States Revenue Act requiring the payment of a license tax. U.S.C. Title 26, Sec. 205 (Rev. Stat. Sec. 3244, as amended.). It is true that a statute defining "person" to include "corporations" was applicable there and that the Court concluded that Ohio should be considered such a corporation in the operation of said business, but the case

*We invite the Court's attention to Mr. Warren's work "Congress, The Constitution and The Supreme Court", p. 75, et. seq. He supports our view that the first Ten Amendments were designed to protect the states as well as individuals.

stands for the broader proposition that the word "person", undefined may include a state, and in that case did so. A number of cases were cited with approval by the Court. Of these,

Giddings vs. Halter, 19 Mont. 263,
48 Pac. 8,

holds that the word "person" includes "United States" within the intent of a covenant in a deed warranting title against "all persons" claiming adversely;

State vs. Herold, 9 Kans. 194,

holds that the United States is a "person" within the meaning of a statute making criminal the cutting of timber etc. on the lands of any "person";

Martin vs. State, 24 Tex. 61,

holds that a statute making it a crime to alter a public record with intent to defraud any "person" was violated if the state was so defrauded;

Indiana vs. Woram, 6 Hill 33,
40 Am. Dec. 378,

holds that a statute defining "person" as including a corporation thereby includes the state, since it was said not to be questionable that "a state is a corporation";

Re Western Improvement Company,
166 Fed. 576,

took a similar view of the word "person", defined by the Bankruptcy Act of 1898 as including corporations.

Apparently viewing the matter as though there was no distinction between a state and other subordinate bodies politic and corporate, this Court also cited:

Bray vs. Wallingford, 20 Conn. 416,

where a "territorial corporation such as a town" was held to be a person within the meaning of a statute granting relief by foreign attachment, and

Lancaster County vs. Trimble, 34 Neb. 752, 52 N. W. 711,

where the Court held a county of Nebraska to be a "person" within the meaning of a statute authorizing the enforcement of tax liens by "persons", and

Rains vs. Oshkosh, 14 Wisc. 372,

where it was held that the City of Oshkosh was a "person" within the meaning of a statute authorizing an action for unlawful holding over of real estate. In that case the Court said:

> "The language of the statute is general, and applies to any person who holds over demised premises after the termination of the lease, or contrary to the covenants thereof or after rent becomes due; and we have no doubt that the word 'person' extends to municipal corporations. We can conceive of no possible reason why the statute should not extend to corporations, public or private, for the remedy is quite as essential and necessary against them as against a natural person."

Lastly, this Court cited with approval

In re Jensen, 28 Misc. 378, 59 N.Y.S. 653,

which we think is rather close to the mark. The Constitution of New York, Art. 1, Sec. 6, contains the customary due process clause—"no person shall be deprived of life, liberty or property without due process

of law." A New York statute provided that any city official who had successfully defended an action by the city charging him with wrongdoing of a certain character should be reimbursed by that city for his expenses and counsel fees. The tribunal designated to determine the amount of such fees was a court, but the statute did not provide the city with an opportunity to present its side of the case to the court. This omission was held to violate the due process clause and the statute was ignored.

In

United States vs. Cooper, 312 U.S. 600, 85 L. Ed. 1071, 61 Sup. Ct. Rep. 742,

this Court, by a four to three decision, held that the United States was not a "person" within the meaning of the Sherman Anti-Trust Act allowing an injured person treble damages because, or at least mainly because, other effective methods of enforcing the Act were open to the Government while relief through treble damages was alone granted to other "persons".

Many years earlier this Court had held that the United States was a "person" within the meaning of a Texas statute of limitations requiring suit against "'persons' in peaceable" etc. possession to be brought within a certain period of limitations. The view of the Court was that the Government might avail itself of the benefits of a statute in favor of persons generally, although not be bound by a statute controlling the acts of "persons" unless by express language such control against the Government was evidenced.

Stanley vs. Schwalby, 147 U.S. 508, 37 L. Ed. 259, 13 Sup. Ct. Rep. 418.

The meaning of the word "person" as used in the Sherman Anti-Trust Act came before this Court again in the late case of

Georgia vs. Evans, —— U.S. ——,
86 L. Ed. 929, 62 Sup. Ct. Rep. 972,

and there the Court held that a state was a "person" entitled to recover treble damages, distinguishing the Cooper case on the grounds already noted.*

Blackstone in his Commentaries (Vol. 1, p. 123) divides persons as follows:

> "Persons also are divided by the law into either natural persons, or artificial. Natural persons are such as the God of nature formed us; artificial are such as are created and devised by human laws for the purpose of society and government; which are called corporations or bodies politic."

We cannot believe that the constitutional guarantees of the Fifth Amendment are to be granted to or withheld from states, and their political subdivisions, on the basis of any distinction between their acting in a proprietary or governmental function. So far as a state is concerned, we submit it would be a distinction without a difference to grant protection if the Court should deem the state was acting merely as a proprietor and deny the protection if it deemed the state was acting in its governmental capacity. Not only would there be difficulties in applying this distinction, but in reason the state is just as much entitled to protect its property rights acquired through the exercise of some conventional governmental function, such as taxation, as it is to protect property it might receive by gift or

*See *Chattanooga F. P. Co. vs. Atlanta*, 203 U.S. 390, 51 L. Ed. 241, 27 Sup. Ct. Rep. 65, where this Court held without discussion that the City of Atlanta was a "person" as defined in the same statute.

grant or judgment. Nothing but confusion could result from an effort to draw such a distinction.

In

Pennsylvania vs. Wheeling Bridge Co.,
18 Howard 421, 15 L. Ed. 435,

a judgment for the state directing the removal of a bridge was constitutionally rendered nugatory by a subsequent Act of Congress legalizing the structure because the Court decree was executory; but the decree carried costs to the state and to that extent it was unaffected, and could not be affected by the Act of Congress. The Court observed that had Pennsylvania secured a judgment for damages instead of an injunction, it could not have been destroyed by Congress.

Nor is the question here involved "political" in its nature, such as were the questions in those cases which arose under the clause guaranteeing to the states a republican form of Government in Article IV, Section 4, of the Federal Constitution and in the so-called "Reconstruction Cases" in which the state of Georgia, as party plaintiff in this Court, sought an injunction against the enforcement of the Reconstruction Acts.

Georgia vs. Stanton, 6 Wall. 50,
18 L. Ed. 721.

Here, the State of Arizona has property rights which it is seeking to protect, namely, taxes and the lien therefor. If more is needed, we call the Court's attention to the fact that these taxes may be used not alone to sustain conventional governmental operations but also the construction and maintenance of industrial operations, which are open to the state under its Constitution. Article II, Section 34, of the Arizona Constitution provides:

> "Section 34. The State of Arizona and each municipal corporation within the State of Arizona shall have the right to engage in industrial pursuits."

Article XIII, Section 5, of the Arizona Constitution provides:

> "Section 5. Every municipal corporation within this State shall have the right to engage in any business or enterprise which may be engaged in by a person, firm, or corporation by virtue of a franchise from said municipal corporation."

We might add that we think it would be rather anomalous, to say the least, if state officers (i.e. county treasurers who collect state taxes) could be brought into Federal courts by a complaint for an injunction against them, which is, of course, a suit against the state for all practical purposes, and they not be permitted on behalf of their state to contest the validity of an Act of Congress upon which the plaintiff relies because, if they were allowed to do so, they would raise a "political" question. It may be that a state cannot initiate such a proceeding in this Court or elsewhere, but it is a different proposition to say that it, or its officers for it, cannot in defense rely upon the Federal Constitution for any such reason. There has been no holding by this Court that they cannot.

Neither is this such a case as

> *Smith vs. Indiana*, 191 U.S. 138,
> 48 L. Ed. 125, 24 Sup. Ct. Rep. 51,

where a county auditor refused to follow the mandate of a statute which lessened a taxpayer's taxes, on the ground that that statute was unconstitutional as violating the Fourteenth Amendment. The Supreme Court

of his state sustained the act and he undertook to carry the case to this Court, which held that the auditor had no such interest as would justify him in his attack in this Court on the statute. The public official was, of course, being, or trying to be, public spirited, but something more than that is needed to justify a challenge of the constitutional validity of state legislation by an officer of that state.

So, also,

Columbus & G. R. Co. vs. Miller,
283 U.S. 96, 75 L. Ed. 81, 51 Sup. Ct. Rep. 392,

where the tax collector brought suit in his state court contesting the validity of a state statute which greatly lowered the railroad company's taxes, on the ground that it violated the Fourteenth Amendment. This Court held, in conformity with the Smith case, that as far as it was concerned, a state official was in no position to challenge an act of the Legislature of his own state.

It is submitted that there is nothing in the context of these amendments, or the purpose behind them, that justifies a construction excluding states and their public subdivisions of their protection as owners of property rights, however acquired or used.

II.

PETITIONERS HEREIN, WHO ARE COUNTIES, MAY INVOKE THE PROTECTION OF THE FIFTH AMENDMENT

Since 1868 this Court, and inferior Federal courts, have consistently held that counties are corporations subject to the jurisdiction of Federal courts. The parent case is

Cowles vs. Mercer County, 74 U.S. (7 Wall.) 118, 19 L. Ed. 86.

It appears from that case that Cowles. a citizen of New York, brought suit in the Circuit Court of the United States for the Northern District of Illinois against the Supervisors of Mercer County, Illinois (a board authorized to contract for the county) upon certain bonds issued by the board on behalf of the county. The board moved to dismiss the case for want of jurisdiction, which was overruled, and the county appealed to this Court. A statute of Illinois provided that,

> "Each county established in the State shall be a body politic and corporate, by the name and style of 'The County of———;' and by that name may sue and be sued, plead and be impleaded, defend and be defended against, in any court of record, either in law or equity, or other place where justice shall be administered;"

In sustaining the jurisdiction of the lower court to entertain the case against the county, the Chief Justice, speaking for this Court, said:

> "The record presents but one question which has not been heretofore fully considered and repeatedly adjudicated. That question is, whether the board of supervisors of Mercer County can be sued in the Circuit Court of the United States by citizens of other States than Illinois. It presents but little difficulty.
>
> "The board of supervisors is a corporation created by acts of the legislature of Illinois. * * *.
>
> "In the case before us the corporators are all citizens of Illinois, and the corporation is liable to suit within the narrowest construction of the Constitution.
>
> "But it was argued that counties in Illinois, by the law of their organization, were exempted from suit elsewhere than in the Circuit Courts of the county. And this seems to be the construction

given to the statutes concerning counties by the Supreme Court of Illinois. But that court has never decided that a county in Illinois is exempted from liability to suit in National courts. It is unnecessary, therefore, to consider what would be the effect of such a decision. It is enough for this case that we find the board of supervisors to be a corporation authorized to contract for the county. The power to contract with citizens of other States implies liability to suit by citizens of other States, and no statute limitation of suability can defeat a jurisdiction given by the Constitution. We cannot doubt the constitutional right of the defendant in error to bring suit in the Circuit Court of the United States upon the obligations of the County of Mercer against the plaintiff in error."

In 1890 the rule announced in *Cowles vs. Mercer County,* supra, was reaffirmed by this Court in

Lincoln County vs. Luning, 133 U.S. 529, 10 Sup. Ct. Rep. 363, 33 L. Ed. 766.

The facts of that case disclose that Luning sued Lincoln County, Nevada, in the Circuit Court of the United States for the District of Nevada upon bonds and coupons which had been issued and sold by the county. Judgment went against the county. The primary question raised was the want of jurisdiction of the Circuit Court to entertain the action because, as it was claimed, the county was an integral part of the state and could not be sued under the Eleventh Amendment to the Constitution in the Circuit Court.

In directing itself to the jurisdictional question, this Court said:

"With regard to the first objection, it may be observed that the records of this court for the last

thirty years are full of suits against counties, and it would seem as though by general consent the jurisdiction of the Federal courts in such suits had become established. But irrespective of this general acquiescence, the jurisdiction of the Circuit courts is beyond question. The Eleventh Amendment limits the jurisdiction only as to suits against a State. * * *.

"With regard to the other objection the case of *Cowles vs. Mercer County*, 7 Wall. 118, 122, is decisive."

See also: *Lake County vs. Dudley*, 173 U.S. 243, 19 Sup. Ct. Rep. 398, 43 L. Ed. 684.

Loeb vs. Columbia Township Trustees, 179 U.S. 472, 21 Sup. Ct. Rep. 174, 45 L. Ed. 280.

Hopkins vs. Clemson Agriculture College, 221 U.S. 636, 55 L. Ed. 890, 31 Sup. Ct. Rep. 654, 35 L.R.A. (N.S.) 243.

And See: *Wayne County vs. U. S.*, 53 Ct. Cl. 417, affirmed 252 U.S. 574, 40 Sup. Ct. Rep. 394, 64 L. Ed. 723.

In *Lincoln County vs. Luning*, supra, constitutional provisions of Nevada were invoked by this Court to establish the corporate character of counties of that state. They are not dissimilar to provisions appearing in the Constitution and laws of Arizona, which constitute counties as bodies politic and corporate.

Section 1, Article XIII, of the Constitution of Arizona, provides:

"Section 1. Each county of the State, now or hereafter organized, shall be a body politic and corporate."

Sections 17-201 and 17-202, Arizona Code Annotated, 1939 (Sections 760, 761, Revised Code of Arizona, 1928) provide:

> "Sec. 17-201. Every county is a body politic and corporate, and the name of the county designated in this chapter is its corporate name, by which it must be known and designated in all actions and proceedings."
>
> "Sec. 17-202. Its powers can be exercised only by the board of supervisors or by agents and officers acting under its authority and authority of law. It has the power to sue and be sued; to purchase and hold lands within its limits; to make such contracts and purchase and hold such personal property as may be necessary to the exercise of its powers; to make such orders for the disposition or use of its property as the interests of its inhabitants require, and to levy and collect such taxes for the purposes under its exclusive jurisdiction as are authorized by law."*

It is observed from the foregoing quotations that the powers, as there enumerated, conferred upon counties of Arizona are similar to the powers conferred upon counties within the State of Nevada. (*Cowles vs. Mercer County,* supra). Among the powers conferred are the powers to sue and be sued; to purchase and hold lands; to make such contracts as may be necessary to the exercise of its powers; and to levy and collect taxes.**

Thus it is perceived counties in Arizona may enter into a variety of contracts to carry out its many com-

*The statute defining the powers of Boards of Supervisors is printed in the appendix at page 1.

**The Constitution of Arizona authorizes the State of Arizona and municipal corporations to engage in industrial pursuits. See page 12 supra. The Legislature of Arizona has authorized counties to construct and operate industrial plants for the manufacture of materials or commodities used in the construction of public highways or other public works. Sec. 17-203 Arizona Code Annotated 1939 which is printed in the appendix at page 1.

plex functions. In this capacity, as we have seen, they act as corporations and are amenable to the jurisdiction of the Federal courts like natural persons or private corporations.

Since a county is a corporation suable in a Federal court, as distinguished from the state, the rationale of the rule seems to justify the conclusion that it should be permitted to invoke the same protection accorded by the Federal Constitution, including the Fifth Amendment, as may the party who sues the county against its will in the Federal court. Jurisdiction of the Federal courts over counties presupposes, we think, that the county when sued stands there upon an equality with its adversary in the right to invoke the protection of the Federal Constitution. None of the cases, so far as our search has revealed, holds that the jurisdiction of the Federal courts over counties is a limited jurisdiction.

The powers conferred upon counties of Arizona include, as shown above, the power "to levy and collect taxes for such purposes", that is to say, for the purpose of performing the remaining powers conferred. Obviously the powers conferred could not be exercised, and when exercised, could not be performed, unless the concomitant power to levy and collect taxes is likewise conferred. Thus the protection afforded a county by the Federal Constitution is as important in its operation upon the tax as it is in its operation upon the powers which are sustained by the tax.

We have shown on pages 19 and 20 of Petitioners' Brief in Support of the Petition for Writ of Certiorari, that counties in Arizona operate upon the budget system and that taxes budgeted, but which are intercepted, impair not only the credit of the state, but also

the credit of the political subdivisions of the state affected by the tax, including counties. Thus, the performance of an executory contract by Maricopa County or Pima County concluded under powers conferred may be intercepted to the extent that a breach results for failure of the county to receive revenues necessary to perform the obligations calculated in the budget. The levy and collection of taxes is an indispensable function of the county, the impairment of which impairs the administration of the governmental affairs of the county under the powers conferred upon it.

Since a county, therefore, in respect to its contractual commitments, is subject to the jurisdiction of the Federal courts, assuredly a suit against a county in the Federal courts which seeks to invalidate a tax lawful when levied, and levied for the purpose of performing those commitments, strikes at the foundation of the orderly administration of the county government.

We believe no solid exception exists which justifies the conclusion that these petitioners may not invoke the Federal Constitution to protect a tax in a suit against them in the Federal courts where its adversary seeks to destroy the tax under a privilege invoked by it under the same Constitution.

Section 24(1) of the Judicial Code, Title 28, U.S.C., provides:

> "The District Courts shall have original jurisdiction as follows:
>
> "First. All suits of a civil nature, at common law or in equity * * * where the matter in controversy exceeds, exclusive of interest and costs, the sum or value of $3,000, and (a) arises under the constitution or laws of the United States * * *

> or (b) is between citizens of different states * * *. No District Court shall have cognizance of any suit (except upon foreign bills of exchange) to recover upon any promissory note or other chose in action in favor of any assignee, or of any subsequent holder, if such instrument be payable to bearer and be not made by any corporation, unless such might have been prosecuted in such court, to recover upon said note, or other chose in action, if no assignment had been made * * *."

It has been consistently held, aside from *Cowles vs. Mercer County* and *Lincoln County vs. Luning*, supra, that within the exception to the jurisdictional statute above quoted which authorizes an assignee of an instrument made payable to bearer to sue only when the instrument is made by a corporation, the word "corporation", as there employed, includes counties.

Pearl River County vs. Wyatt Lumber Co., (4 Cir.) 270 Fed. 26.
Scott County vs. Advance-Rumley Thresher Co. (8 Cir.) 288 Fed. 739.
Pettibone vs. Cook County, (8 Cir.) 120 Fed. (2d) 850 (Note 1, p. 851).
Bloomfield Village Drain District vs. Keefe, (6 Cir.) 119 Fed. (2d) 157.

In these proceedings, petitioners, as counties, were sued against their will in the District Court of Arizona in suits wherein the respondent bank invoked the protection of the Constitution of the United States. (Tr. of Rec. Par. XXXIX, p. 75 and Par. XL, p. 146). Petitioners, as defendants below, by their answers, likewise invoked the protection of the Constitution of the United States against the retroactive feature of the Act of Congress of March 20, 1936. (Tr. of Rec. Pars. XLV, XLVI, XLVII, pps. 167, 168, and Tr. of

Rec. Pars. XLV, XLVI, XLVII, pps. 185, 186). This protection was invoked by petitioners in the Circuit Court of Appeals (Tr. of Rec. pps. 346 to 356 inclusive) as is now invoked in this Court. (Petition for Writ of Certiorari, Specifications of Error, pps. 8, 9, and 10.).

We think the conclusion follows that counties, under the decisions of this Court, and inferior Federal courts, stand like private corporations when the jurisdiction of the Federal courts is invoked against them. No reason is perceived why they should not, since they are bodies corporate exercising many powers and functions similar to those exercised by natural persons and private corporations.

Insofar as these proceedings affect the petitioners, as counties, it has been demonstrated in Petitioners' Brief in Support of the Petition for Writ of Certiorari that the tax, and the lien of the tax, for the year 1935 was levied and impressed before the effective date of the Act of March 20, 1936, and that the lien of the tax for the year 1936 was impressed before the effective date of that Act. (Petition for Writ of Certiorari, pps. 5, 6. See, also, decision of the Circuit Court of Appeals, 130 Fed. (2d) 356.)

These taxes, and the liens of taxes, are things of value to Maricopa County and Pima County which the Act of March 20, 1936 seeks to destroy. The right to them is no less valuable than a right flowing from any other exercised power which may be questioned in the Federal District Court of Arizona. We think no controlling distinction, for the purpose of the decision of this case, exists between the matters litigated in the decisions heretofore cited and those litigated here. Counties, by their constituted nature, are cor-

porations although they exercise a public function, and since they are suable in that capacity in the Federal courts, then once they are sued there, equality of justice would seem to dictate that they stand clothed with every defense permitted by law to all suitors, including the right to invoke the protection of the Fifth Amendment.

III.

PETITIONERS HEREIN, WHO ARE COUNTIES, MAY INVOKE THE PROTECTION OF THE TENTH AMENDMENT

The Supreme Court of Arizona has held that statutes of limitation may not be invoked against the county under the rule of *nullum tempus occurrit regi*.

City of Bisbee vs. Cochise County,
52 Ariz. 1, 78 Pac. (2d) 982.

By that decision the Supreme Court of Arizona applied the same rule to counties as is applied to the state so far as they are freed from statutes of limitation. The decision rests upon the holding that counties in Arizona are created by virtue of the sovereignty resting in the state; that they draw all their powers from that sovereignty and are created for the sole purpose of exercising the limited part of sovereignty delegated to them.

The important feature of the foregoing decision of the Supreme Court of Arizona, insofar as it applies to this case, is that a county of Arizona exercises the power of taxation only by virtue of the power of sovereignty, and that when the tax collected by the county is applied in the execution of its governmental functions, necessarily it is so applied for the benefit of the people of the state as a whole, and that although the exercise of the power of taxation by the county is

exercised in its name, nevertheless the use of the tax involves and affects the state itself.

No reason is perceived why the petitioners here, as counties, if we look to their origin and present status, do not exercise that measure of sovereignty which entitles them to invoke the protection of the Tenth Amendment. Counties are the oldest units of the American Government. Before the adoption of the Constitution they were the chief organs of local government by which the people exercised the administration of governmental affairs, and in many respects their primary functions have been translated to the modern county.

McQuillan on Municipal Corporations, (2nd Ed.) Sec. 88, p. 248.

The sovereignty of the State of Arizona is exercised in a large part by the several counties, and while exercising their sovereign power in laying and collecting taxes, counties are, in effect, the state itself.

City of Bisbee vs. Cochise County, supra.
Dillon on Municipal Corporations, (5th Ed.) Sec. 35, p. 64.

The impairment of a county tax, to the extent it impairs the functions of the county government, in like respect impairs the administration of the state government. As a result, we think, it follows that the relationship which the counties in Arizona bear to the state, particularly in respect of matters of taxation, authorizes them to invoke the protection of the Tenth Amendment when they are sued in the Federal District Court.

CONCLUSION

As disclosed in petitioners' Brief in Support of the Petition for Writ of Certiorari (p. 27) the respondent bank pleads that it stands ready to pay as taxes such further sums over and above the tenders which it made as may be found to be just and equitable. (R. 56, 124; R. 239, 308).

Accordingly, it is again respectfully urged that the judgments of the Circuit Court of Appeals, and of the District Court, be reversed with directions to enter judgments for petitioners for the full amount of the taxes levied and to foreclose the liens thereof.

Respectfully submitted,

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Appendix Follows

APPENDIX

Section 17-203, Arizona Code Annotated, 1939:

"17-203. *Industrial pursuit—Election to determine bond issue.*—The board of supervisors may, and upon petition of fifteen (15) per cent of the property taxpayers of the county, who are also qualified electors, shall call an election of such taxpayers to determine whether the bonds of said county shall be issued and sold for the purpose of constructing, installing and operating an industrial plant for the manufacture of materials or commodities for use in the construction of public highways or other public works of the county. Whenever the bonds of any county shall be authorized at said election and issued and sold, then said county shall have power to own or lease and operate the plants for which said bonds were so authorized, in any county of the state. Said election shall be called and conducted and the results returned and canvassed as in other county bond elections. The bonds shall be sold by the board in the same manner as other county bonds. The proceeds shall be placed in a special fund in the county treasury, as the 'County Industrial Pursuits Fund' and shall be used only for the purposes for which said bonds were authorized."

Section 17-309, Arizona Code Annotated, 1939:

"17-309. *Powers of board enumerated.* — The board of supervisors, under such limitations and restrictions as are prescribed by law, may:

"1. Supervise the official conduct of all county officers, and officers of all districts and other subdivisions of the county charged with assessing, collecting, safekeeping, management or disbursement of the public revenues, see that they faithfully perform their duties, direct prosecutions for delinquencies, and, when necessary, require renewals

of their official bonds and make reports, and present their books and accounts for inspection;

"2. Divide the counties into such districts or precincts as required by law, change the same and create others as convenience requires;

"3. Establish, abolish and change electric precincts, and appoint inspectors and judges of elections, canvass election returns, declare the result and issue certificates thereof;

"4. Lay out, maintain, control and manage public roads, ferries and bridges within the county and levy such tax therefor authorized by law;

"5. Provide for the care and maintenance of the indigent, sick and the dependent poor of the county; erect and maintain homes and hospitals therefor; provide in their discretion a farm in connection with the county hospital, and make regulations for working the same;

"6. Provide suitable rooms for county purposes;

"7. Purchase, receive by donation, or lease any real or personal property necessary for the use of the county prison, take care of, manage and control the same, but no purchase of real property may be made unless the value has been previously estimated by three (3) disinterested citizens of the county, appointed by the board for that purpose, and no more than the appraised value may be paid therefor;

"8. Cause to be erected and furnished a courthouse, jail, hospital and such other buildings as necessary, and construct and establish a branch jail, when necessary, at a point distant from the county seat;

"9. Sell at public auction at the courthouse door, after thirty (30) days previous notice given by publication in a newspaper of the county, and

convey to the highest bidder, for cash, any property belonging to the county and by the board deemed not needful for the use of the county, paying the proceeds into the county treasury for the use of the county;

"10. Examine and exhibit the accounts of all officers having the care, management, collection or disbursement of money belonging to the county, or appropriated by law or otherwise for its use and benefit;

"11. Examine, settle and allow all accounts legally chargeable against the county, and order warrants to be drawn on the county treasurer therefor, and provide for the issuing of the same;

"12. Levy such tax annually on the taxable property of the county as may be necessary to defray the general current expenses thereof, including salaries otherwise unprovided for, not exceeding two dollars ($2.00) on every hundred ($100) of value for any one (1) year; and levy such other taxes as are required to be levied by law;

"13. Equalize assessments;

"14. Direct and control the prosecution and defense of all actions to which the county is a party, and compromise the same;

"15. Insure the county buildings in the name of and for the benefit of the county;

"16. Fill by appointment all vacancies occurring in county or precinct offices;

"17. Adopt provisions for the preservation of the health of their respective counties as necessary, and provide for the expenses thereof;

"18. Contract for the county printing and advertising, and provide books and stationery for county officers;

"19. Provide for the rebinding of any county records, or, if necessary, the transcribing of any records;

"20. Make and enforce such rules and regulations for the government of their body, the preservation of order and the transaction of business as necessary;

"21. Adopt a seal for the board, a description and impression whereof must be filed by the clerk in the office of the county recorder, and secretary of state;

"22. Do and perform all other acts and things necessary to the full discharge of the duties as the legislative authority of the county government; but a supervisor shall not vote upon any measure in which he, or any member of his family, or partner, may be pecuniarily interested;

"23. Make and enforce all local, police, sanitary and other regulations not in conflict with general laws;

"24. Establish, maintain and conduct, or aid in establishing, maintaining and conducting public aviation fields, and purchase, receive by donation, or lease any property necessary therefor; may lease or sell the same to the United States; or exchange lands acquired pursuant hereto for other lands, or act in conjunction with the United States in maintaining, managing and conducting the same. When leases are made to the United States or to any department thereof the lease may provide for a nominal rental. When any such property be not needed for the purposes herein mentioned it shall be sold by the board and the proceeds paid into the general fund of the county;

"25. Acquire and hold property for the use of county fairs and conduct, take care of and manage the same;

"26. Authorize the sheriff to offer a reward, not exceeding five hundred dollars ($500) in one (1) case, for the apprehension of any person convicted of or charged with crime;

"27. Contract for the transportation of insane persons from their county to the State Hospital for the Insane, or direct the sheriff to transport such persons and allow the expenses thereof;

"28. Bury deceased indigents and mark their graves with a stone, giving the name, age, and date of death;

"29. Sell or grant to the United States the title or interest of the county in any toll road or toll train in or partly within a national park, upon such terms and considerations as may be agreed upon by the board and the secretary of the interior of the United States;

"30. County boards of supervisors are hereby authorized and empowered to enter into agreements for acquiring rights of way, construction, reconstruction or maintenance of highways in their respective counties with the government of the United States, acting through its duly authorized officers or agents pursuant to any act of congress.

"Agreements heretofore entered into by boards of supervisors with the government of the United States for acquiring rights of way, construction, reconstruction or maintenance of highways in their respective counties are hereby validated and confirmed. The boards of supervisors may pay as rewards for the destruction of wild animals in their counties, as follows: Lobos or timber wolves, mountain lions, pumas or panthers, ten dollars ($10.00) each; coyotes, two dollars ($2.00) each; raccoons, twenty-five cents (25c) each; lynx and wildcats, one dollar ($1.00) each; and jackrabbits, gophers and prairie dogs, five cents (5c) each. The person claiming the reward shall produce the entire hide

of such animals, except jackrabbits, the ears of which shall be sufficient, before the board of the county in which such animal was killed. When the hide of such animal is produced the board shall mark or mutilate same in such manner that the bounty can not again be collected, but in such a way as to injure as little as possible the commercial value of said hide, which shall then become the property of the county. The board shall examine such persons and other witnesses on oath, touching the time when, and the place where such animal was taken and killed, and the affidavit of at least one (1) person other than the claimant shall be filed stating that he saw the carcass of the animal freshly killed, in the possession of the claimant and in the county, the date thereof, and a description of the animal.

"Each member, and the clerk, may administer oaths, but they shall charge no fees therefor. (R. S. 1901, Secs. 973, 1000, 1012, 1027, 1044; Laws 1912, ch. 62, Sec. 1, p. 287; 1913, Secs. 2418, 2447, 2457, 2473, 2476, 2477; Laws 1927, ch. 55, Secs. 1, 2, 3, p. 125; 1927 (4th S. S.), ch. 26, Sec. 1, p. 188; cons. & rev., R. C. 1928, Sec. 774; Laws 1931 (1st S. S.), ch. 7, Sec. 1, p. 14.)"